

BENCH LAKE IRRIGATION CO.

IBLA 82-857

Decided January 12, 1984

Appeal from a decision of the Utah State Office, Bureau of Land Management, determining right-of-way rental payment. U-34443.

Affirmed.

1. Administrative Procedure: Hearings -- Appraisals -- Federal Land Policy and Management Act of 1976: Rights-of-Way -- Hearings -- Rights-of-Way: Federal Land Policy and Management Act of 1976 -- Rules of Practice: Hearings

The holder of a right-of-way issued pursuant to Title V of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1761 through 1771 (1976), is required to pay annually, in advance, the fair market value of the grant. Appellant's contention that it should not pay annual rental is properly rejected where appellant's flood control project is completed but the right-of-way grant remains in effect and the land is being used for a dam, spillway, and reservoir.

APPEARANCES: Mac J. Hall, secretary, Bench Lake Irrigation Company, Hurricane, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Bench Lake Irrigation Company appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated May 3, 1982, determining the rental charges for right-of-way U-34443 to be \$590 annually beginning September 29, 1982, to September 28, 1983. The decision states that right-of-way U-34443 was granted on September 29, 1977, and that a reappraisal of its value has caused BLM to set annual rental charges at \$590. Regulation 43 CFR 2803.1-2 is cited for the requirement that payment of the fair market value must be made for the use and occupancy of public lands.

Appellant's statement of reasons in support of its appeal is set forth in full:

We would like to appeal the Right-of-way payment being charged Bench Lake Irrigation Co. 2800 U-34443 (U-942). It was our understanding that in our agreement with the B.L.M. we

were required to post a \$1500.00 bond and pay a yearly right of way. But that upon the reseeded of the area the contract would be fulfilled, our bond would be returned, and the yearly payments would cease. The area was reseeded last spring, and our bond was returned.

Your letter states that under regulation 43 CFR 2803.1-2 requires the payment of fair market value for use and occupancy of the public lands. We contend that we neither use nor occupy the land that we are being charged for. The dam does not alter our flooding problem in any way, and we are not allowed to regulate water flow from it at all. The use of that land by other parties has not been diminished. The appearance of the area has not been noticeably altered.

In fact we feel that since we are not allowed to use the land or the facilities on it that we cannot rightfully be charged any usage fee, let alone one that has risen 319% in six months.

Right-of-way U-34443 was granted on September 29, 1977, for a 30-year term expiring September 28, 2007. The use permitted by the grant is set forth as "Flood Retarding and Drainage Basin Structure 69.0 Acres." Appellant sought the right-of-way to construct a dam, spillway, and reservoir, as outlined in BLM's land report of February 7, 1977:

The Bench Lake Irrigation Company seeks this right-of-way in order to enlarge its present flood control facility in Township 42 South, Range 13 West, Section 24, SLM. This present facility lies entirely on an 80-acre tract owned by the company. In order to enlarge it, extension onto public lands is necessary. While only a small portion of the dam and spillway will actually be on public land, an easement large enough to permit construction activity is being requested. This construction easement covers approximately 56 acres of public land in Section 24. The reservoir behind this dam structure will have a maximum surface area of approximately 130 acres. Some 60 acres of this potential reservoir will be on public lands. No traverse has been surveyed for the reservoir, but its maximum extent will be delineated by the emergency spillway level of 4,122.7 feet elevation.

Page one of appellant's right-of-way grant addresses the issue of rental charges in this manner:

Rental

Amount: \$615.00 Rental Deposit

When payable by grantee: Rental Amount not yet Determined

That same page sets forth Title V of the Federal Land Policy and Management Act of October 21, 1976 (FLPMA), 43 U.S.C. § 1761 (1976), as BLM's authority for issuing the right-of-way. Page two of the grant states that the right-of-way is subject to, inter alia, applicable regulations at 43 CFR Subparts 2801 and 2802.

Appellant's statement of reasons sets forth two issues, the first of which involves its understanding that upon reseeding the disturbed area in the right-of-way, its contract would be fulfilled, its bond would be returned, and its yearly payments would cease. Paragraphs 20 and 21 of the grant address the bonding and reseeding issues and are set forth in full in this footnote. ^{1/} Our examination of these provisions provides no support for appellant's contention that annual rental charges will cease during the 30-year duration of the right-of-way.

[1] As noted above, page one of the right-of-way grant sets forth Title V of FLPMA as the authority for BLM's issuance of the instant grant. Section 504(g); 43 U.S.C. § 1764(g) (1976), provides in part: "The holder of a right-of-way shall pay annually in advance the fair market value thereof as determined by the Secretary granting, issuing, or renewing such right-of-way." (Emphasis supplied.) This provision makes clear the very issue that appellant disputes. Approximately 1 month prior to issuance of the right-of-way, BLM quoted this same portion of section 504(g) to appellant by letter dated September 1, 1977. There is no suggestion in this letter that annual payments for the right-of-way would cease during its 30-year period. Section 504(g) further provides:

Rights-of-way may be granted, issued, or renewed to a Federal, State, or local government or any agency or instrumentality thereof, to nonprofit associations or nonprofit corporations which are not themselves controlled or owned

^{1/} These paragraphs provide:

"20. Grantee will provide a compliance bond in the amount of \$1,500.00 made payable to the United States Government. This bond shall remain in effect until final completion of the project and for at least six (6) months thereafter.

"21. The grantee agrees to rehabilitate the right-of-way granted to the following specifications.

"a. All disturbed areas will be graded and smoothed to as near original contours as possible.

"b. The waste deposit material will be shaped to blend with the dam and natural contour and seeded in accordance with (c) below.

"c. The disturbed areas will be reseeded at a rate of eight (8) pounds per acre with a mix of the following species. This mix may vary as dictated by the availability of seed.

"Fourwing Saltbrush -- Atriplex canescens

"Indian Ricegrass -- Oryzopsis hymenoides

"Galleta (Curlygrass) -- Hilaria jamesii

"Stipa -- Stipa viridula

"Blackbrush -- Coleogyne ramosissima

"Winter Fat -- Eurotia lanata

"Western Wheatgrass -- Agropyron smithii

"This seeding treatment will be done within a year after the completion of construction, but during the period mid-September to mid-November. Actual seeding will be done by broadcast and tamping."

(Emphasis in original.)

by profitmaking corporations or business enterprises, or to a holder where he provides without or at reduced charges a valuable benefit to the public or to the programs of the Secretary concerned * * * for such lesser charge, including free use as the Secretary concerned finds equitable and in the public interest.

In Tri-State Generation and Transmission Assoc., Inc., 63 IBLA 347 (1982), the Board discussed the legislative history of this section. The decision quoted from Senate Report No. 583 as follows:

"Subsection (f). This subsection provides that no right-of-way shall be issued for less than 'fair market value' as determined by the Secretary. The proviso at the end of the subsection qualifies this standard where the applicant is a State or local government or a nonprofit association. In this case, the right-of-way may be granted for such lesser charge as the Secretary determines to be equitable under the circumstances. However, it is not the intent of this Committee to allow use of national resource land without charge except where the holder is the Federal Government itself or where the charge could be considered token and the cost of collection would be unduly large in relation to the return to be received. [Emphasis supplied.] [S. Rep. No. 583, 94th Cong., 1st Sess. 72-73 (1975).]

63 IBLA at 351 n.1.

Regulations implementing section 504 were adopted on July 1, 1980. 45 FR 44526. The applicable regulations provide:

§ 2803.1-2 Rental fees.

(a) The holder of a right-of-way grant or temporary use permit, except as provided in paragraphs (b) and (c) of this section, or when waived by the Secretary, shall pay annually, in advance, the fair market rental value as determined by the authorized officer. Said fee shall be based upon the fair market value of the rights authorized in the right-of-way grant or temporary use permit, as determined by appraisal by the authorized officer, provided however, that where the annual fee is \$100 or less, an advanced lump-sum payment for 5 years for right-of-way grants and 3 years for temporary use permits may be required.

(b) To expedite the processing of any grant or permit pursuant to this part, the authorized officer may establish an estimated rental fee and collect this fee in advance with the provision that upon receipt of an approved fair market value appraisal the advance rental fee shall be adjusted accordingly.

(c) No fee, or a fee less than fair market rental, may be authorized under the following circumstances:

(1) When the holder is a Federal, State or local government or any agency or instrumentality thereof, excluding municipal utilities and cooperatives whose principal source of revenue is customer charges.

(2) When the holder is a nonprofit corporation or association which is not controlled by or is not a subsidiary of a profit making corporation or business enterprise.

(3) When a holder provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary. [Emphasis supplied.]

Appellant has made no argument on appeal that it qualifies under any of the exceptions that might permit an annual rental of less than fair market value.

The file reveals that appellant made one payment of \$615 on September 23, 1977, 2/ and payments of \$185 in 1978, 1979, and 1980, respectively. Although the regulation states that right-of-way charges may be made by lump sum payment, appellant's practice of making periodic payments during this period removes any doubt that it may have understood the grant to impose a single lump sum payment. Indeed, its statement of reasons acknowledges that it expected to pay a yearly right-of-way charge.

Appellant's second argument on appeal is the contention that it does not use or occupy the right-of-way lands at issue and hence should not be charged for them. It points out that the use of the land by other parties is unchanged, that the appearance of the area has not been noticeably altered, that its flooding problem remains, and that it cannot regulate water flow from the dam. The record reveals, however, that 69 acres of the public lands remain devoted to use as a reservoir, dam, and spillway. The duration of this use is 30 years. The grant at issue specifies in paragraphs 15 and 22 that the right-of-way area shall be available for other public uses, such as hunting, hiking, picnicking, and wildlife, and that the Secretary may grant additional rights-of-way or permits for compatible uses on the lands at issue. Paragraph 21, quoted at note 1, is set forth in the grant to ensure that the appearance of the lands at issue will not be noticeably altered. The fact that a flooding problem remains and that appellant cannot regulate the water flow from the dam does not remove the obligation of appellant to pay its annual rental charges. There is no suggestion in the grant that payment of annual charges is conditional upon the resolution of appellant's flooding problem or its ability to regulate water from the dam.

2/ Remarks set forth on BLM's accounting receipt indicate that BLM intended to apply \$185 of this amount to right-of-way charges and to refund the remainder.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Utah State Office is affirmed.

Anne Poindexter Lewis
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

